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### **Arlie Loughnan, Manifest Madness: Mental Incapacity in the Criminal Law**

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The discussion is, perhaps, not as comprehensive as it could have been (compare, for example, the more detailed consideration given to similar issues in Stuart Green's *Lying, Cheating and Stealing* (2006)). It might also have benefitted from mentioning the work of Antony Duff and others who have argued that a focus on harm is misplaced and it is the notion of a public wrong that ought to inform decisions about criminalisation (see e.g. Duff's *Answering for Crime: Responsibility and Liability in the Criminal Law* (2007)). That said, the aim of the book was not to provide a comprehensive account of the criminalisation debate and it should not therefore be judged on this basis.

Chapter six contains a more extensive criticism of the way in which breach of the peace has been defined and interpreted by the courts. Ferguson notes that even since the arrival of the new statutory offences discussed in chapter four, some conduct that would more appropriately fall within their auspices is still being prosecuted as breach of the peace, something she rightly criticises on the basis that it sits uncomfortably with the principle of fair labelling (116). The chapter also discusses a number of other problematic issues, most notably the requirement within the definition of breach of the peace for a "public element" to the conduct (*Harris v HM Advocate* 2010 JC 245). This has led to a series of confusing and contradictory cases, to the extent that it is almost impossible to predict whether conduct will fall within the ambit of the offence or not (see the excellent discussion at 110-115). Ferguson makes the telling observation that if the Lord Advocate gives evidence to the Justice Committee that is not consistent with charging practice in reported cases (113), then something is clearly amiss.

On this and other issues, the critique contained in the book is a pertinent one. Ferguson's suggested way forward is a narrower statutory definition of breach of the peace along the lines of that contained in the Draft Criminal Code for Scotland (of which she was a co-author), accompanied by the use of existing statutory alternatives for conduct that does not fit within this re-definition. This seems eminently sensible and the book sets out a convincing case for proceeding along these lines. All in all, this is an impressively thorough account of the case law and practice and a persuasive argument for law reform. The insights contained are enhanced by the author's prior experience as a procurator fiscal. This experience shines through in a text that has both practical and scholarly merit. As such, the book will be of great interest to academics, students and legal practitioners.

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**Arlie Loughnan, MANIFEST MADNESS: MENTAL INCAPACITY IN THE CRIMINAL LAW**

Oxford: Oxford University Press ([www.oup.com](http://www.oup.com)), 2012. xxii + 212 pp. ISBN 9780199698592. £65.

In this monograph Arlie Loughnan offers a fresh understanding of the way that mental incapacity doctrines operate in the criminal law. She also advances an original account of the theoretical underpinnings of these doctrines based on their shared characteristics and the way they interact with one another. Although the book focuses on the law of England and Wales, the interdisciplinary nature of Loughnan's research (which draws on law, psychology and philosophy) and her holistic approach to the subject ensure that her insights hold broad significance.

In the first part of the book Loughnan presents the case for rethinking mental incapacity doctrines. In doing so, she cites the commonly-held perception that this area of the law is a “rag-bag” (4) set of complex legal constructs that are characterised by unusual rules of evidence and conflict between medical and legal sources of knowledge. In contrast (though not in contradiction) to this account, Loughnan advances an alternative reconstruction of the mental incapacity terrain, which transcends its traditional boundaries. By focusing her attention beyond mental incapacity defences and including doctrines such as automatism and infancy, which are not routinely included in discussions of mental incapacity, Loughnan aims to expose the unappreciated commonalities that link the disparate legal doctrines and to uncover the deep structure of this area of the law.

This task is arguably the most innovative undertaking of the book and, consequently, it is also the most stimulating and potentially contestable. Loughnan’s initial reasons for re-drawing the boundaries of the mental incapacity terrain are robust and convincing, for doing so allows her to sidestep the “deceptively sharp contrast” between “defences” and “denials of responsibility” (19). Furthermore, adopting a broad perspective allows Loughnan to develop some new and engaging arguments about the function and form of mental incapacity doctrines. These include the claims that mental incapacity doctrines play both inculpatory and exculpatory roles within the criminal law and that, through the operation of these doctrines, the individuals who rely upon them are constructed as “abnormal”.

In addition, Loughnan contends that all of the mental incapacity doctrines she examines share certain features, which justify their inclusion in the paradigm she develops in chapter three: manifest madness. Based on George Fletcher’s pattern of manifest criminality, manifest madness comprises an ontological and an epistemological facet. The ontological facet relates to the way that madness is treated, in Loughnan’s view, as dispositional—in the sense that it persists over time. The epistemological facet relates to the way that madness is able, in Loughnan’s view, to be “read off” (49) the defendant’s conduct.

Whether one accepts these arguments depends to some extent on one’s view of the remaining two parts of the book. This is because Loughnan’s more general, theoretical claims are founded on the socio-historical analysis of individual mental incapacity doctrines she conducts in chapters four to nine. In this regard, the book would have benefitted from slightly more integration, so that the themes of the first three chapters could have more explicitly permeated the other, more doctrinal chapters. That said, there are two clear trends that unify Loughnan’s discussion of each mental incapacity doctrine: the increasing formalisation of the law and the increasing relevance of expert knowledge. The law’s increasing formalisation constitutes the move away from informal, morally-evaluative legal practices towards the more technical and morally-neutral practices that typify our contemporary legal ideals. This process is in turn linked to the growth of expert knowledge, for the process of formalisation both required and encouraged the use of expert evidence and opinion. Although Loughnan tracks both of these trajectories in her discussion of the law’s development, she does not relay a simplistic narrative of change. Instead, she provides a refreshingly frank account in which the law’s evolution is characterised as much by continuity as it is by change.

Each of the doctrine-specific chapters demonstrates Loughnan’s detailed and nuanced grasp of the legal rules, practices and procedures and each amounts to a valuable piece of freestanding scholarship that will be of interest to scholars and law reformers alike. Furthermore, on several occasions Loughnan expresses her own interpretation of the particular doctrine(s) under consideration, such as in her decision to consider infancy and unfitness to plead in conjunction (chapter four). These are to be welcomed as they elevate the analysis beyond pure description of the law’s practices and doctrines and demonstrate the originality of Loughnan’s enterprise.

One criticism of the book is the absence of a concluding chapter. Including such a chapter would have provided a valuable opportunity to draw together the complex and sophisticated arguments put forward in part one of the book, and to re-iterate the points where these arguments intersect with the doctrinal chapters. Notwithstanding this, *Manifest Madness* is a book of great merit. It is a thoroughly researched and engaging piece of work that successfully marries deep, theoretical and normative issues with detailed consideration of legal doctrine and procedure, an achievement that few scholars attempt let alone accomplish. Equally praiseworthy is the socio-historical dimension to Loughnan's research which, as Loughnan acknowledges, places her amongst a number of scholars, including Nicola Lacey, Lindsay Farmer and Alan Norrie, who have given prominence to this type of legal scholarship. Loughnan is to be congratulated for producing a book that strengthens this exciting field.

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### **Geraint Thomas, THOMAS ON POWERS**

Oxford: Oxford University Press ([www.oup.com](http://www.oup.com)), 2nd edn, 2012. cxxvii + 845 pp. ISBN 9780199539697. £235.

*Thomas on Powers* is a comprehensive study of the rules and principles governing the creation, exercise, and termination of powers in private law. Fourteen years after the first edition, *Powers* remains the only modern monograph dedicated to private law powers in common law. The current edition is an extensive update and expansion of the previous text. It covers all relevant judicial and legislative developments in English law, with references to cases in other common law jurisdictions, including many offshore jurisdictions. For the most part, Thomas maintains an excellent balance between details relevant to practitioners and underlying themes and parallels that are of interest for academic researchers. Indeed, in the Preface the author makes a strong case for the need to narrow the gap between the academic and the practitioner, by integrating abstract theory and law as practiced in the "real world".

Three chapters deserve special mention and will be reviewed in more depth. Chapter one sets the conceptual and terminological framework for the analysis of private law powers. This chapter is particularly significant for academic scholars, as it goes to the heart of the concept of power as a fundamental concept of private law. Thomas' definition of power is limited to powers over another's property: power is an authority or mandate conferred on, or reserved by, a person to deal with, as well as dispose of, property which he himself does not own. This is a suitable working definition for the intents and purposes of the book. From an academic perspective, however, it is very narrow, and it does not correspond entirely with the established use of the concept of power in analytical jurisprudence. Thomas does not engage with, or refer to, Hohfeld's definition of power. This is regrettable, since Hohfeld's taxonomy of fundamental private law concepts is adopted in virtually all contemporary discussions on the nature and content of legal rights, *lato sensu*.

Another relevant part of this chapter deals with the similarities between principles of judicial review in public law and principles of exercise of discretion in private law. Thomas has an ambivalent position in this respect. On the one hand, he outlines the extensive cross-fertilisation and close parallels existing between the principles applicable to the exercise of powers in public law and in private law. Moreover, the grounds on which the exercise of fiduciary powers may be challenged are remarkably similar to those laid down as the basis for judicial review in public law. On the other hand, he discards such parallels as superficial